Supreme Court, U.S.
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No. 93-1260

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

ALFONSO LOPEZ, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Two points in respondent's brief in opposition warrant a brief reply.

1. Respondent argues (Br. in Opp. 2-3) that the decision of the court of appeals does not warrant review because it "did not annul" 18 U.S.C. 922(q) entirely, but instead left open the possibility that some prosecutions under that provision would be constitutionally permissible. As we explained in the petition (at 4 n.1), the court of appeals stated that it was "[c]onceivabl[e]" that a conviction under Section 922(q) "might be sustained if the government alleged and proved that the offense had a nexus to commerce." Pet. App. 53a. But the court of appeals' reservation on that point does not undermine the significance of the decision in this case, which relies on the Constitution to overturn petitioner's conviction. That conviction

rested on an indictment and evidence establishing conduct proscribed by the language of the statute. The decision of the court of appeals invalidating that conviction thus invalidates Congress's decision to extend criminal sanctions to that conduct.

2. Respondent also attempts (Br. in Opp. 3-4) to downplay the significance of the conflict between the decision of the court of appeals in this case and the decision of the Ninth Circuit in *United States* v. *Edwards*, 13 F.3d 291 (1993). Respondent points out that the panel in *Edwards* rested its decision on an earlier Ninth Circuit decision interpreting the Commerce Clause. See Br. in Opp. 3 (discussing *United States* v. *Evans*, 928 F.2d 858 (9th Cir. 1991), which rejected a constitutional challenge to 18 U.S.C. 922(o)). But the precedential basis for the decision in *Edwards* does not undermine the fact, with which respondent agrees, that the "conflict between this case and *Edwards* * * * ha[d] [a] real effect on the court of appeals' disposition of this case," Br. in Opp. 4. To put the matter more directly, if respondent's conduct had occurred in the Ninth Circuit, his conviction would have been affirmed. The invalidation of his conviction by the Fifth Circuit accordingly creates a square conflict warranting review by this Court.

* * * * *

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

DREW S. DAYS, III
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